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No. ~~93-493~~

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

PAUL A. KELLY and PAMELA E. KELLY,

Petitioners,

vs.

PAUL A. OBER, CHARLES M. WATKINS, ANNA MIHELC and PAULINE MIHELC,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Pennsylvania

BRIEF OF RESPONDENTS PAUL A. OBER AND CHARLES M. WATKINS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Pennsylvania Courts "have so far departed from the accepted and usual course of judicial proceedings" so as to necessitate the supervision of the Supreme Court of the United States?

2. Whether the Pennsylvania Courts "have decided an important question of federal law which has not been, but should be, settled by the Supreme Court of the United States"?

PARTIES TO THE INSTANT PROCEEDING

Paul A. Kelly and Pamela E. Kelly are the Petitioners in the instant action. Paul A. Kelly is also an attorney by profession. The nature of the action herein involves an underlying lawsuit initiated by the Respondents Anna Mihelc and Pauline Mihelc and by and through their counsel, Paul A. Ober and Charles M. Watkins, also Respondents herein.

Respondents Paul A. Ober and Charles M. Watkins are attorneys who filed a lawsuit on behalf of Anna Mihelc and Pauline Mihelc in the Court of Common Pleas of Susquehanna County which serves as the subject of the underlying dispute or action. As stated, Respondents Anna Mihelc and Pauline Mihelc were the parties Plaintiff in the initial underlying action raising allegations against the Petitioners, Kelly.

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CITATIONS OF OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

In the Supreme Court of Pennsylvania in the Middle District at No. 278 M.D. Allocatur Docket, 1992. (App. A at p. 16).

In the Superior Court of Pennsylvania at No. 1939 Philadelphia 1991. (App. B at p. 17).

In the Court of Common Pleas of Susquehanna County, Pennsylvania at No. 1991-188 C.P. (App. C at p. 33).

STATEMENT OF GROUNDS OF JURISDICTION

An Order of the Supreme Court of Pennsylvania denying petition for allowance of appeal from the Superior Court of Pennsylvania was entered on August 18, 1993. (App. A at p. 16). The Petitioners allege jurisdiction of the United States Supreme Court under 28 U.S.C. § 1257.

CONSTITUTIONAL STATUTES, PROVISIONS AND/OR TREATIES

It is respectfully submitted by counsel for the Respondents Paul A. Ober and Charles M. Watkins that the within action involves no applicable Federal and/or Constitutional statutes, provisions and/or treaties.

STATEMENT OF THE CASE

The within action arises from a civil lawsuit filed by the Petitioners, Paul A. Kelly and Pamela E. Kelly, his wife, v. Respondents, Paul R. Ober; Charles M. Watkins; Anna Mihelc; and Pauline Mihelc, in the Court of Common Pleas of Susquehanna County, Civil Action Number 1991-188 C.P. The Complaint was filed on or about March 25, 1991.

The aforedescribed Complaint arises from and repeatedly refers to an earlier Complaint filed by Plaintiffs, Anna Mihelc and Pauline Mihelc, on or about March 11, 1990 in the Court of Common Pleas of Susquehanna County at Civil Action Number 1990-25 C.P. The Respondents Paul R. Ober, Esquire and Charles M. Watkins, Esquire, were and still are the attorneys of record for the Mihelcs in the initial lawsuit. This initial lawsuit is still pending in the Susquehanna County Court of Common Pleas.

The earlier action instituted by the Mihelcs as against the Kellys, involves an alleged real estate transaction wherein the Mihelcs allege a number of causes of action against the Kellys, namely: (1) Fraud in the execution; (2) Fraud in the inducement; (3) Intentional infliction of emotional distress; (4) Rescission for failure of consideration; (5) Rescission for grossly inadequate consideration; and (6) Constructive trust.

The latter action filed by the Kellys, which is the subject pleading of the within appeal, arises from the initial action filed by the Mihelcs and alleges the following causes of action related thereto: (1) Defamation of character; (2) Intentional infliction of emotional distress;

(3) Negligent infliction of emotional distress; (4) Wrongful use of civil proceedings; (5) Slander of title; (6) Breach of warranty; (7) Losses, damages, and injuries; (8) Loss of consortium; and (9) Punitive damages.

On or about April 23, 1991, in response to the Complaint of the Plaintiffs, Kelly, the Defendants (Respondents herein), Paul A. Ober and Charles M. Watkins, filed Preliminary Objections to the Plaintiffs' Complaint in the nature of a Demurrer raising several legal arguments, including but not necessarily limited to the argument that the Complaint of Plaintiffs/Kelly should be dismissed in light of governing and applicable case law authority setting forth a privilege for statements made in pleadings and other official or tribunal proceedings. On or about April 26, 1991 the Respondents, Anna Mihelc and Pauline Mihelc, filed Preliminary Objections to the Plaintiffs' Complaint raising similar arguments.

On May 22, 1991 oral argument on the Respondents' Preliminary Objections in the nature of a Demurrer were held before the Honorable Kenneth W. Seamans of the Court of Common Pleas of Susquehanna County. Thereafter, on June 7, 1991 the Honorable Kenneth W. Seamans by way of Order and Opinion of same date held for reasons set forth by the Defendants/Appellees (Respondents herein) at the time of argument, and further upon Briefs submitted that the Preliminary Objections in the nature of a Demurrer are sustained and that the Plaintiffs' Complaint be dismissed. (App. C at p. 33).

The Petitioners, Kelly, thereafter filed an appeal to the Superior Court of Pennsylvania. The Superior Court of Pennsylvania following oral argument and submission

of legal briefs entered an Order on June 7, 1991 affirming in part and reversing in part the decision of the Susquehanna County Court of Common Pleas. (App. B at p. 17). In summary the Superior Court of Pennsylvania affirmed the decision of the Susquehanna County Court except for the lone cause of action referring to breach of warranty, as well as allegations regarding punitive damages.

The Petitioners thereafter filed a petition for allowance of appeal in the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania on August 18, 1993 entered an Order denying the petition for allowance of appeal. (App. A at p. 16).

REASONS FOR DENYING THE WRIT

I. Summary of Argument

Pennsylvania law uniformly holds that statements made by parties in the course of litigation or pursuant to any other judicial proceeding are absolutely privileged and cannot classify as defamatory language. The absolute privilege extends to pleadings, which in this particular case would be equivalent to the initial lawsuit filed by the Respondents herein, Mihelc, by and through counsel Respondents herein, Ober and Watkins, against Petitioners herein, Kelly. The absolute privilege afforded to such statements, including pleadings, is a matter of policy, including but not necessarily limited to freedom of access to the Courts; encouragement of complete and unintimidated testimony; and enabling counsel to best represent the interests of his/her client. Furthermore, the

Court of Common Pleas of Susquehanna County, by and through the Honorable Kenneth W. Seamans, appropriately and properly construed the alleged defamatory language as being pertinent and material to the relief and issues raised in that matter. Additionally, the Court of Common Pleas of Susquehanna County also correctly pointed out that the Complaint of the Petitioners, Kelly, in the above captioned matter arises entirely from the so-called defamatory language complained of despite the fact that said complaint is labeled with various causes of action. Therefore, it is respectfully requested and submitted by the Respondents herein that the Pennsylvania Courts, including Common Pleas, Superior Court and Supreme Court have not departed from accepted and usual course of judicial proceedings nor have they raised an important question of federal law which has not been settled by the Supreme Court of the United States but rather have properly relied upon and interpreted Pennsylvania case law in granting the Preliminary Objections in the nature of a Demurrer filed on behalf of the Respondents herein.

II. The Pennsylvania Courts Did Not Depart From The Accepted And Usual Course Of Judicial Proceedings At Any Time

Rule 10 of the Supreme Court of the United States sets forth that:

> "A review on writ of certiorari is *not a matter of right,* but of judicial discretion, and will be granted *only when there are special and important reasons therefor.*"

> Rules of the Supreme Court of the United States (emphasis added).

In light of the aforementioned Rule 10, neither the Susquehanna County Court of Common Pleas; the Superior Court of Pennsylvania nor the Supreme Court of Pennsylvania departed from the "accepted and usual course of judicial proceedings", but rather relied upon traditional principles of Pennsylvania law which take into consideration the interests of justice and fairness to the litigants involved.

In granting the Respondents' Preliminary Objections in the nature of a Demurrer, both the Susquehanna County Court of Common Pleas, as well as the Superior Court of Pennsylvania, relied upon landmark case law in Pennsylvania, including *Greenberg v. Aetna Insurance Co.*, 427 Pa. 511, 235 A.2d 576, 577 (1976), cert. denied 392 U.S. 907, 88 S.Ct. 2063 (1968). In the *Greenberg* decision, the Supreme Court of Pennsylvania set forth its rationale in making this determination by stating:

> " 'All charges, all allegations and averments contained in regular pleadings addressed to and filed in a Court of competent jurisdiction, which are pertinent and material to the redress or relief sought, whether legally sufficient to obtain it or not, are *absolutely privileged. However false and malicious, they are not libelous.* This privilege rests on public policy, which allows all suitors * * * to secure access to the tribunals of justice with whatever complaint, true or false, real or fictitious, they choose to present, provided only that it be such as the court whose jurisdiction is involved has power to entertain and adjudicate. The alleged libelous matter in the present case,

> being contained in a bill praying for an injunction, was relevant and material; consequently, *absolutely privileged'*. * * * the authorities, though differing as to when immunity is absolute, *are uniform that, when alleged libelous matter in pleadings is relevant and pertinent, there is no liability for uttering it.* Public policy requires this, even if at times the privilege of immunity for false and malicious averments in pleadings is abused. Justice can be administered only when parties are permitted to plead freely in the courts and to aver whatever ought to be known without fear of consequences, if a material and pertinent averment should not be sustained. Wrong may at times be done to a defamed party, but it is damnum absque injuria. The inconvenience of the individual must yield to a rule for the good of the general public."

Greenberg, 235 A.2d at p. 578, citing *Kemper v. Ford*, 219 Pa. 85, 67 A. 991.

Additionally, in a later decision of *Binder v. Triangle Publications, Inc.*, 442 Pa. 319, 275 A.2d 53 (1971), the Supreme Court of Pennsylvania ruled that "All communications pertinent to any stage of a judicial proceeding are accorded an absolute privilege which cannot be destroyed by abuse." *Binder*, 275 A.2d at p. 56, citing other cases.

Similarly, in March of 1991 the Superior Court of Pennsylvania concluded that statements or allegations made by parties to a lawsuit, whether civil or criminal, are absolutely privileged and may not form the basis for a later defamation action. *Pawlowski v. Smorto*, 403 Pa. Super. 71, 588 A.2d 36 (1991). The Superior Court in

Pawlowski held that "it has long been the law of Pennsylvania that statements made by judges, attorneys, witnesses, and parties in the course of or pertinent to any stage of judicial proceding are absolutely privileged and, therefore, cannot form the basis for liability for defamation". *Pawlowski*, 588 A.2d at 41, citing other cases. The policy set forth by the Superior Court in enunciating such a rule provides as follows:

> "The reasons for the absolute privilege are well recognized. A judge must be free to administer the law without fear of consequences. This independence would be impaired were he to be in daily apprehension of defamation suits. The privilege is also extended to parties to afford freedom of access to the Courts, to witnesses to encourage their complete and unintimidated testimony in Court and to counsel to best enable him to represent his client's interests. Likewise, the privilege exists because the Courts have other internal sanctions against defamatory statements, such as perjury or contempt proceedings".

Pawlowski at 41, citing *Binder*, supra at 323-24, 275 A.2d at 56 (1971).

For the foregoing reasons previously discussed herein it is respectfully requested and submitted by the Respondents herein that the Pennsylvania Courts, namely the Susquehanna County Court of Common Pleas; the Superior Court of Pennsylvania and the Supreme Court of Pennsylvania have properly ruled on the Preliminary Objections relative to within action. It is respectfully requested and submitted by the Respondent that the

Pennsylvania Courts have not departed in any way from the accepted and usual course of judicial proceedings.

III. The Pennsylvania Courts Have Not Raised An Important Question Of Federal Law Which Has Not Been Settled By The Supreme Court Of The United States, Nor One That Should Be Settled By The High Court

For the reasons previously set forth in the preceding section together with the applicable case law cited therein it is respectfully requested and submitted that the decisions of the Pennsylvania courts do not involve an important question of federal law which has not been, and/or should be settled by the Supreme Court of the United States. To the contrary the case involves an issue of Pennsylvania substantive law which has been properly decided by the Pennsylvania courts in analyzing and interpreting Pennsylvania law. As such, the case at bar does not present an important question of federal law for the Supreme Court of the United States, but rather presents a question which has been uniformly and properly decided by the Pennsylvania courts.

CONCLUSION

WHEREFORE, for the reasons set forth herein, the Respondents Paul A. Ober and Charles M. Watkins, respectfully request that the Honorable Supreme Court of the United States deny certiorari in the present action.

Respectfully submitted,

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